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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

B'NAI B'RITH, INC., *Petitioner*

v.

SAUL E. JOFFEE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, B'nai B'rith, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 24, 1970.

OPINION BELOW

The Court of Appeals rendered no opinion. A copy of its judgment is attached hereto as Appendix A. The United States District Court for the District of Columbia entered a Memorandum—Order on March 3, 1969 and an Order on Judgment on March 24, 1969.

Copies of the Memorandum—Order and the Order on Judgment are attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 24, 1970 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the district court was lacking in jurisdiction to enter judgment for the respondent and therefore whether the Court of Appeals erred in affirming such a judgment.

2. Whether, under applicable federal labor law the collective bargaining agreement, which was interpreted and applied by the district court as the basis of the right to recover, did not also, in its grievance and arbitration procedures, constitute the exclusive means for the settlement of grievances, including claims for severance pay, pay in lieu of advance notice of separation and pay for accrued leave, and hence bar an action in court to recover such benefits.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Labor-Management Relations Act of 1947, as Amended, 29 U.S.C. §§ 142(1) and (3), 152(2), (3), (5), (6) and (7), and 185, are set forth in Appendix C attached hereto.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the District of Columbia was invoked in this case under 11 D.C. Code § 521 (1967) and the fact that the

amount involved exceeds Ten Thousand Dollars ($10,000.00) exclusive of costs."

The case concerns a grievance with respect to claims for severance pay, pay in lieu of advance notice of separation and pay for accrued leave, arising under a collective bargaining agreement covering a unit consisting of the professional staff employed by petitioner, B'nai B'rith, in its national headquarters.

B'nai B'rith is a nonprofit corporation organized under the laws of the District of Columbia with widespread operations throughout the United States and throughout various parts of the world. Its national headquarters is located in the District of Columbia.

Respondent, Saul E. Joftes, was a B'nai B'rith employee attached to its headquarters staff. As a member of this staff, Joftes was represented by a labor organization known as the B'nai B'rith Headquarters Staff Association and his employment was governed by the terms of a collective bargaining agreement between B'nai B'rith and the Staff Association which established the latter "as the sole and exclusive agency for negotiating policies and conditions, the correction of grievances and disputes, and other matters pertaining to personnel practices for regular executive employees."

The agreement, which is reproduced in full in Appendix D, attached hereto, covers a broad range of the conditions of employment of the headquarters staff.

B'nai B'rith's troubles with Joftes began at a time prior to January 1967 when Joftes was Director General of its International Council. B'nai B'rith, dissatisfied with his performance and deciding that it

had grounds for dismissal under the agreement, served upon Joftes a written notice of dismissal dated January 6, 1967,[1] assigning as reasons for its adverse personnel action "lack of capacity and competence". On February 20, 1967, petitioner served a second notice of dismissal on respondent, deeming it appropriate "to supplement and supersede" the first notice of January 6. The second notice, unlike the first, used the literal agreement language "malfeasance, misfeasance and nonfeasance" as additional grounds for the discharge.

Each of these notices was signed on B'nai B'rith's behalf by Rabbi Jay Kaufman, Executive Vice President.

Joftes protested the action and, following negotiations, the parties settled this initial grievance in an agreement dated March 22, 1967, rescinding the action of dismissal and providing for Joftes' reassignment to a new headquarters staff position without change in salary, with responsibilities in "research, special assignments, membership, speech-making, fund raising and other allied duties, domestically and abroad".

The settlement of the 1967 discharge grievance did not end the matter. On December 28, 1967, respondent filed a one million dollar libel action against Rabbi Jay Kaufman predicated on the January 6 and February 20 dismissal notices. The language used in these notices to describe the grounds for adverse action, *i.e.*, "lack of capacity and competence" and "malfeasance, misfeasance and nonfeasance" (taken from the limiting language in Article VII of the agreement) con-

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[1] Paragraph 2.d. of Article VII of the agreement provides that notices of dismissal shall be in writing.
agreement.

stituted the basis for respondent's defamation action against the Rabbi.

Rabbi Kaufman had acted for B'nai B'rith as its Executive Vice President in signing these notices, and, accordingly, B'nai B'rith responded to Joftes' move against Rabbi Kaufman by serving respondent with a second and final notice of dismissal dated January 5, 1968,[2] signed by Dr. William A. Wexler, President of B'nai B'rith. In this notice, Dr. Wexler, in explaining the grounds for the dismissal, used the words "gross personal misconduct of such a nature as to make your continuing employment a detriment to the purposes of B'nai B'rith," identified as the "lawsuit you are bringing against the Executive Vice President of B'nai B'rith."

On January 16, 1968, Joftes, in a letter addressed to the B'nai B'rith comptroller, made a formal claim for severance pay,[3] relying on Article XVII of the agreement, and demanded immediate payment. On February 14, 1968, Dr. Wexler responded to this letter with the advice that "I respond . . . only to make it clear that your dismissal dated January 5, 1968 was by reason of misconduct constituting 'malfeasance, misfeasance and nonfeasance' within the contemplation of the agreement between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association, as revised December 15, 1964."

In his affidavit of February 5, 1969 filed in this action, Dr. Wexler explained "that plaintiff's action

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[2] Again pursuant to paragraph 2.d. of Article VII of the agreement.

[3] In addition to such fringe items as vacation pay, notice pay, balance of salary, as well as other monies which he said were owing to him.

in filing suit against Rabbi Kaufman for one million dollars after it was agreed to retain him in another capacity out of an act of compassion and charity on the part of B'nai B'rith and a desire not to hurt plaintiff was the culmination of a long history of misconduct by the plaintiff which caused me to terminate his services finally and irrevocably."

These are the essential facts upon which Joftes based his motion for summary judgment.

The two basic points upon which petitioner relied in its answer to the complaint were: (1) a denial of the essential allegations of the complaint, and (2) preclusion of the action based upon respondent's failure to exhaust the remedies provided by the collective bargaining agreement upon which the claim is based.

The district court overruled the defenses raised by petitioner and granted respondent's motion for summary judgment. It concluded, on the basis of "the pleadings in the action, the exhibits and affidavits in support of and in opposition to the motion, and having heard oral argument," that a proper interpretation and application of the contract entitled the plaintiff to recover as a matter of law. The Court of Appeals affirmed without opinion.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW APPEARS SQUARELY TO CONFLICT WITH THE DECISION OF THIS COURT IN REPUBLIC STEEL CORPORATION v. MADDOX, 379 U.S. 650

In the *Maddox* case, as here, there was a suit in court for severance pay. There, as here, the claim to severance pay was based only on a collectively bargained agreement. (379 U.S. 650-51; Memorandum —Order, Appendix B, *infra.*) There, as here, the same

agreement provided a grievance procedure culminating in binding arbitration. (379 U.S. 651; Appendix D, *infra*, Article XVIII.) But in neither case was the grievance and arbitration procedure invoked. (379 U.S. 651; Memorandum—Order, Appendix B, *infra*.) In neither case was there an express provision in the agreement making the prescribed grievance procedure exclusive nor an express provision making such procedure non-exclusive. (379 U.S. 657-8; Appendix D, *infra*, Article XVIII.) In *Maddox* it was held that the lack of an express provision making the grievance and arbitration procedure of the contract non-exclusive made it exclusive, thereby precluding a suit in court, and it is submitted that the doctrine of *Maddox* required such a holding in the instant case.

In the absence of an opinion from the Court of Appeals we are left to conjecture why *Maddox* was not applied.

We can be reasonably confident that the Court was not persuaded by the arguments advanced by respondent, since they are so tenuous as at least to border on the frivolous. First, "executive employee" is equated with "supervisor" and it is then argued that the Headquarters Staff Association is not a "labor union" despite the lack of any factual showing that it is composed exclusively of supervisors; the fact is that the majority are non-supervisory, and, if this were disputed, a material issue of fact would be raised making summary judgment inappropriate. *International Organization of Masters. M & P* v. *N.L.R.B.*, 122 U.S. App. D.C. 74, 351 F.2d 771 (1965), is cited in support of the argument that *Maddox* is not controlling, although the *M. M. P.* case sustained a holding that an organization was a labor union when one

and one-half per cent of the employees represented were non-supervisory.

Next, the Court of Appeals was told that, because the respondent himself was a supervisor (which he probably was before 1967, he is entitled to rely on the collectively bargained agreement as giving him a right to severance pay but was not required to seek enforcement of that right exclusively through the grievance and arbitration provisions of the the same agreement (Article XVIII). In support of this proposition, the Court of Appeals was referred primarily to *International Union of United Brewery, etc.* v. *N.L.R.B.*, 111 U.S. App. D.C. 383, 298 F.2d 297, 302-305, sustaining an N.L.R.B., holding that truck-driving salesmen of soft drinks were not supervisors in relation to the helpers they were permitted to engage

Finally, the Court of Appeals was urged, on the basis of *Vaca* v. *Sipes*, 386 U.S. 171, 185 (1967), to hold that judicial relief was available because the grievance and arbitration procedure would have been futile. This argument seems to be predicated essentially on the fact that respondent's grievance arose at pretty near the top administrative level and hence pursuit of administrative appeals would have been ridicrous. But there is not the slightest suggestion that arbitration, the adjudicatory and final ad binding step in the process, would have been unfair or futile.

This brings us to a matter that is not of record but that seemed to be of major concern to the Court of Appeals during oral argument, namely, that the District Court did not explicitly determine the question whether it could, consistently with the holding in *Maddox*, entertain this case.

Implicitly, the District Court necessarily determined the issue, not only by entering judgment for the respondent, but more specifically by virtue of the fact that petitioner's answer expressly raised the issue as a separate and third defense, and the District Court's Order on Judgment recites that the Court has "considered the pleadings in the action, the exhibits and affidavits in support of and in opposition to the motion."

It must be acknowledged, however, that in specific response to the motion for summary judgment the inability of court to entertain this action was not relied on and the *Maddox* decision was not brought to the District Court's attention.

We can understand that this circumstance would be of concern to the Court of Appeals as a matter of fairness to the District Court, and, perhaps, because of it, the case might properly have been remanded to the District Court for consideration in light of *Maddox*. But it did not warrant affirmance.

Maddox expresses a fundamental principle of federal labor policy that transcends the interest of a particular employer and employee involved in a particular lawsuit. The importance and prevading nature of federal labor policy, of which *Maddox* is undeniably a part, was again expressed at last year's term of this Court in *Boys Markets, Inc.* v. *Retail Clerks,* No. 768, Oct. Term 1969, 37 L.W. 4462 (June 1, 1970).

As we understand the principle of *Maddox,* it goes to jurisdiction of the subject matter, and at least the Court of Appeals for the Sixth Circuit understands it the same way. *Durham* v. *Mason and Dixon Lines, Inc.,* 401 F.2d 864, 866. If we are correct in this under-

standing, jurisdiction of the subject matter cannot be conferred by waiver or estoppel. F.R.C.P. Rule 12(h)(3); *United States* v. *Corrick*, 298 U.S. 435; *United States* v. *Griffith*, 303 U.S. 226. If the parties had done everything in their power to confer jurisdiction on the District Court, they could not have done so.

Suppose, however, that our reading of *Maddox* is wrong and that it does not, strictly, go to the jurisdiction of the subject matter within the meaning of that term as used in the cases cited in the preceding paragraph. Even on that supposition, it cannot be argued that the District Court was right in exercising jurisdiction or that the Court of Appeals could affirm the judgment consistently with *Maddox*.

The *Maddox* issue of preclusion, based on failure to exhaust the contract remedies, was not waived but, on the contrary, as pointed out above, was raised in defendant's answer to the complaint and was before the District Court at the time of its decision, even though not specifically pressed in opposition to the motion for summary judgment.

Even apart from this, however, there is no support in this record for either the waiver or the estoppel point.

Admittedly, *Maddox* itself says that the employer and the union could have made a different kind of agreement and thus have made Maddox inapplicable; *i.e.*, they could have provided specifically that the grievance and arbitration procedure should not be exclusive. See 379 U.S. 657-658. Conceivably, therefore, it could be argued that, if this litigation were between the employer and the union, some kind of conduct of the parties during litigation could somehow amount to an amendment of the agreement *nunc pro tunc* so as to

make court jurisdiction available. But the union is not a party to this litigation, and there is nothing the employer could have done in the absence of the union, even had it tried, to make this a different kind of agreement.

The decision of the District Court, in view of the considerations outlined above, is so clearly a departure from, and so clearly constitutes a substantial erosion of, the policy expressed by this Court in *Maddox* that the Court below should not have permitted it to stand. Accordingly, we submit that the case is appropriate for corrective action by this Court either in the exercise of its supervisory jurisdiction over the inferior federal courts or in clarification of the principles which it has heretofore announced.

2. IT IS IMPORTANT TO THE ADMINISTRATION OF FEDERAL LABOR LAW THAT, IF THERE IS ANY POSSIBLE RECONCILIATION BETWEEN THE DECISION BELOW AND THE DECISION OF THIS COURT IN THE MADDOX CASE, THE DISTINCTION BE FULLY ARTICULATED IN AN OPINION OF THIS COURT

It is, of course, open to the Court to grant the writ herein prayed for and summarily to reverse the decision below on the authority of *Maddox*. If that is done, the lower courts, other lawyers, and we will understand that the authority of *Maddox* has not been beclouded by the decision below.

In the absence of a grant of the petition, however, the decision below can be cited in every court in the country having a related issue before it as diminishing the applicability of *Maddox* in some undefined way. We truly believe that the lower courts and other lawyers will be as much at a loss as we are to know what, if any, distinction there is.

CONCLUSION

For the foregoing reasons, we respectfully submit that the writ of certiorari should issue to review the judgment of the court below and that upon such review the judgment should be reversed.

SHELDON E. BERNSTEIN

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Of Counsel

APPENDIX "A"

Filed June 24, 1970

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1969.

Civil Action 2561-68.

No. 23,067

SAUL E. JOFFES

v.

B'NAI B'RITH, INC., *Appellant.*

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT and TAMM, *Circuit Judges*, and NICHOLS,* Judge, U. S. Court of Claims.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing. It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

PER CURIAM

For the Court:

NATHAN J. PAULSON
Clerk

Dated: June 24, 1970.

*** Sitting by designation pursuant to Title 28, U.S. Code, Section 293(a).**

APPENDIX "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2561-68

SAUL E. JOFFES, *Plaintiff*

v.

B'NAI B'RITH, INC., *Defendant*

Memorandum-Order

This matter came on for hearing on plaintiff's motion for a summary judgment of its complaint for benefits under a contract of employment. It appears that there is no genuine issue as to the material facts.

Plaintiff was employed by B'nai B'rith for more than twenty years. As of January 5, 1968, an agreement existed between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association which governed the rights and duties of plaintiff and defendant concerning employment and discharge. Under articles VII and XVII of the agreement, an employee could be dismissed for either "malfeasance, misfeasance or nonfeasance (including incompetence of a continuing nature), or gross personal misconduct not connected with his official duties but of such a nature as to make his continuing employment a detriment to the purposes of B'nai B'rith." If an employee were discharged for the former reason, he would not be entitled to severance pay. If, however, he were discharged for "gross personal misconduct," he would be entitled under a particular formula to as much as one year's salary in severance pay.

In 1967, after notice and discussion, B'nai B'rith discharged plaintiff for "malfeasance, misfeasance and nonfeasance." He was and in defendant's words "had been for some time a thorn in the side of the organization." Plaintiff appealed to his superiors to reconsider and after

further discussions they agreed to retain him "in another capacity out of an act of compassion and charity."

Subsequently, plaintiff filed a law suit against Rabbi Kaufman. When on January 5, 1968, his superior, Dr. William Wexler, learned of the suit, plaintiff was notified by phone that he was dismissed. Pursuant to the applicable agreement, he was notified that same day by letter from Dr. Wexler that he was dismissed from his employment for "gross personal misconduct of such a nature as to make your continuing employment a detriment to the purposes of B'nai B'rith."

On February 14, 1968, Dr. Wexler mailed to plaintiff a second letter which purported to clear up any confusion as to the first letter and which stated that plaintiff was discharged for "malfeasance, misfeasance, and nonfeasance." Defendant contends that it has raised a genuine issue of material fact as to the intent of Dr. Wexler when he fired the plaintiff. The Court disagree.

Defendant's second letter to plaintiff purporting to amplify the reasons for discharge was mailed about five weeks after the dismissal of plaintiff. The reasons for the dismissal are set forth clearly and unambiguously in the letter of January 5th. Under the employment agreement (Art. VII, ¶ 2d), reasons for dismissal must be stated in writing.

Defendant says the actual reasons for dismissal are set forth in the second letter dated five weeks after action was effected. If plaintiff were dismissed for the reasons stated in the second letter, he would be entitled to no severance pay. Defendant also takes the position that plaintiff's work had not been satisfactory for some time and that inferences should be drawn from the first letter as explained by the second letter that the actual reason for the dismissal was "malfeasance, misfeasance and nonfeasance" which would not entitle plaintiff to severance pay under the agreement.

It is noteworthy that the letter of January 5, 1968, quotes precisely the language of the agreement concerning the firing for gross personal misconduct. It is clear and unambiguous.

Thus, the only question in the case is not one of fact or inference and not one which would appropriately be submitted to a jury. It is merely whether the filing of the law suit, an act not logically connected with the employment and an act which admittedly precipitated the discharge, was "gross personal misconduct" as described in the letter of January 5, 1968, or whether it may be considered as a continuation of the "malfeasance, misfeasance and nonfeasance" which had earlier troubled the organization.

Dr. Wexler, President of the organization, upon being advised of the pendency of the law suit dismissed plaintiff and as required by the contract, stated the reasons in writing. The stated reasons entitled plaintiff to severance pay under the agreement. Under the circumstances, the Court would not be justified in reading into the letter which effected the decision an intent which is not expressed therein. In oral argument, counsel with commendable candor stated that Dr. Wexler's choice of language was deliberate because on a prior occasion when he used the words "malfeasance, misfeasance and nonfeasance," plaintiff filed a law suit.

Plaintiff's motion for summary judgment is granted.

Order accordingly.

/s/ Oliver Gasch
Judge

Date 3 Mar. 1969

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2561-68

SAUL E. JOFTES, *Plaintiff*

v.

B'NAI B'RITH, INC., *Defendant*

Order on Judgment

This cause having come on to be heard on motion of plaintiff for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings in the action, the exhibits and affidavits in support of and in opposition to the motion, and having heard oral argument and having found that there is no genuine issue of fact to be submitted to the trial Court, and having concluded that plaintiff is entitled to judgment as matter of law, it is hereby

ORDERED, that plaintiff's motion for summary judgment is in all respect granted, and it is further

ORDERED and ADJUDGED that the plaintiff, SAUL E. JOFTES have judgment against the defendant B'nai B'rith, Inc., for and in the amount of Twenty Thousand ($20,000.00) Dollars as severance pay, the amount of One Thousand Six Hundred and Sixty Six and 66/100 ($1,666.66) Dollars as payment in lieu of notice and the amount of Three Thousand Seventy Six and 80/100 ($3,076.80) Dollars for accumulated annual leave or a total of Twenty Four Thousand Seven Hundred Forty Three and 46/100 ($24,743.46) Dollars with interest thereon at the rate of six per centum (6%) per annum from January 6, 1968, until paid, and his costs as assessed by the Clerk.

Dated the 24th day of March, 1969.

/s/ OLIVER GASCH
U. S. District Judge

APPENDIX "C"

RELEVANT STATUTORY PROVISIONS

Labor Management Relations Act of 1947, as Amended

Title I—Amendment of National Labor Relations Act

* * *

DEFINITIONS

"Sec. 2. When used in this Act—

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. § 152(2)

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor

Act, as amended from time to time, or by any other person who is not an employer as herein defined. 29 U.S.C. § 152(3).

* * *

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. § 152(5)

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country. 29 U.S.C. § 152(6)

"(7) The term 'affecting commerce' means in commerce, or burdening or obstrucing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. 29 U.S.C. § 152(7)

* * *

Title III

Suits By and Against Labor Organizations

"Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be

brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. 29 U.S.C. § 185.

• • •

TITLE V

DEFINITIONS

"Sec. 501. When used in this act—

"(1) The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce. 29 U.S.C. § 142(1)

"(3) The terms 'commerce,' 'labor disputes,' 'employer,' 'employee,' 'labor organization,' 'representative,' 'person,' and 'supervisor' shall have the same meaning as when used in the National Labor Relations Act as amended by this Act." 29 U.S.C. § 142(3)

APPENDIX "D"

AGREEMENT

between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association as revised December 15, 1964

PREAMBLE

The Supreme Lodge of B'nai B'rith (hereinafter referred to as B'nai B'rith) and the B'nai B'rith Headquarters Staff Association (hereinafter referred to as "Staff Association") agree on the following personnel practices:

ARTICLE I—RECOGNITION

1. B'nai B'rith hereby recognizes the Staff Association as the sole and exclusive agency for negotiating policies and conditions, the correction of grievances and disputes, and other matters pertaining to personnel practices for regular executive employees

a. who operate out of national headquarters in Washington, D. C.;

b. who are not voting members of the Board of Governors or any national lay governing body of B'nai B'rith; and

c. whether or not said employees are members of the Staff Association; except that employees of B'nai B'rith Women and of the national office of B'nai B'rith Hillel Foundations, B'nai B'rith Youth Organization and B'nai B'rith Vocational Service are specifically excluded from provisions of this agreement.

ARTICLE II—USE OF FACILITIES AND TIME BY EMPLOYEES

1. The use of facilities in the B'nai B'rith Building by the Staff Association is authorized, subject to administrative regulations.

2. During working hours no employee shall engage in Staff Association activities on the premises of B'nai B'rith except for the purpose of conference with the employer agency, nor shall an employee engage in any activity other than the business of B'nai B'rith.

ARTICLE III—DISCRIMINATION

1. An employee may join or refrain from joining the Staff Association, and B'nai B'rith shall give no preferential treatment to, nor discriminate against, any employee because of membership or non-membership in the Staff Association.

2. B'nai B'rith shall not encourage or discourage membership or participation in the Staff Association of any employee who is eligibile to join.

3. There shall be no discrimination against a regular employee because of race, sex or marital status.

4. B'nai B'rith shall make no individual or private agreement with a regular employee in conflict with or contrary to the terms of the personal matters covered in this Agree-

ment, nor shall B'nai B'rith enter into any agreement in conflict with the intent of this Agreement to establish for regular employees uniform personnel practices and conditions of employment for the matters defined in this Agreement.

ARTICLE IV—DEFINITIONS AND CONDITIONS OF EMPLOYMENT

1. B'nai B'rith has the sole right to recruit, employ, promote, transfer and dismiss any of its employees, subject to the provisions of this Agreement.

2. A *new employee,* within ten days after hiring, shall receive from B'nai B'rith a copy of this Agreement and a memorandum setting forth his duties, initial salary and other matters pertaining to his employment.

3. A *temporary employee* is one who is engaged for a period not to exceed one year. In the event a temporary employee is retained permanently in the same assignment, or one of equivalent duties, he shall be deemed to have completed his probationary period and shall be deemed a regular employee.

4. A *part-time employee* is one who is hired for less than thirty hours per week in accordance with agreed terms of employment.

5. A *regular employee* is one who is hired for thirty hours or more a week for work of a continuing nature and who has satisfactorily completed the probationary period as defined in paragraph 6 of this Article.

6. The probationary period for a regular employee shall be six months, but may be extended by mutual agreement in writing for not more than six additional months. B'nai B'rith shall inform an accepted applicant, before employment, of the length and nature of his probationary period.

a. Written notice of evaluation of performance shall be given to the employee by his immediate supervisor at

the end of three months, and at the conclusion of the probationary period.

b. B'nai B'rith shall give notice in writing to a probationary employee whose probationary period is not to be completed. The notice period shall be the equivalent of one day for every two weeks of continuous employment, or fraction thereof, of the probationary employee, but not to exceed one month.

c. An employee who is retained following completion of the probationary period shall be deemed a regular employee and shall be entitled to all rights thereof, retroactive to his first day of full-time employment.

d. When a regular employee is transferred to a new assignment, arrangements shall be made for his return to his previous assignment or equivalent thereof, within six months, if the results of the new assignment are not mutually satisfactory.

ARTICLE VI—SENIORITY

1. Seniority for a regular employee shall be computed on continuous length of service beginning from the first day of full-time employment with any national, district or regional component of B'nai B'rith. Service as an employee of an individual lodge or chapter shall be excluded.

2. Vacation as defined in Article XV and Leaves as defined in Article XIV shall be included in computing length of service.

3. Seniority is interrupted but not lost during other leaves of absence without pay.

ARTICLE VI—SEPARATION

1. A regular employee released from employment because of reorganization or retrenchment shall be given two months separation notice in writing in addition to severance pay as defined in Article XVII.

2. Seniority shall be recognized as a major determining factor for continuing the employment of a regular employee whose job has been eliminated or reduced by reorganization or a reduction in force.

3. In the event it is impractical to reassign a regular employee otherwise subject to separation, B'nai B'rith will make every reasonable effort to help the separate employee find suitable employment elsewhere.

ARTICLE VII—DISMISSAL

1. A regular employee may be dismissed from employment only on the grounds of malfeasance, misfeasance, nonfeasance (including incompetence of a continuing nature), or gross personal misconduct not connected with his official duties but of such a nature as to make his continuing employment a detriment to the purposes of B'nai B'rith.

2. a. A regular employee shall be granted one month notice of dismissal, except in cases of malfeasance.

b. In dismissals for incompetence of a continuing nature, after two years service, a regular employee shall receive two months' notice.

c. A dismissal for incompetence of a continuing nature shall be based on cumulative evidence and evaluation, including an opportunity for the employee to improve his performance prior to notice of dismissal.

d. In all cases, the notice of dismissal or evaluation shall be in writing.

3. Within the notice period, B'nai B'rith may, at its discretion, terminate the actual duties of the employee.

ARTICLE VIII—RESIGNATION

1. A regular employee shall give a minimum of two months' notice of resignation.

ARTICLE IX—RELOCATION

1. A regular employee who is to be relocated, subject to mutual agreement between B'nai B'rith and himself to establish, where necessary, maximum allowances, shall be reimbursed.

a. Actual and necessary cost of transporting his family and household goods to his new location.

b. Reasonable and necessary expenses incurred in securing suitable housing.

c. Actual and necessary living expenses incurred when he is required to report to his new assignment before it is practical to complete his household move, but in no case shall these expenses exceed the travel and per diem allowance.

ARTICLE X—PROMOTION

1. B'nai B'rith shall adhere to the principle of promotion-from-within and shall give preference in filling a staff vacancy to a regular employee if his qualifications are equal to those of an outside applicant.

2. B'nai B'rith shall publicly advise all regular employees of staff vacancies, describing the nature of the duties and professional requirements, and shall invite and act on applications from employees covered by this Agreement prior to making a decision.

3. Seniority shall be a major factor in promotions.

ARTICLE XI—INCREMENTS

1. B'nai B'rith shall consider annually each regular employee for a salary increment.

ARTICLE XII—WELFARE BENEFITS

1. *Medical and Hospitalization Plan.* A regular employee of B'nai B'rith shall, at his individual option, be covered

by group major medical insurance. B'nai B'rith shall pay two-thirds and the employee one-third of the cost of the individual premium.

a. Any change in the existing medical and hospitalization plan shall be by mutual agreement of the Staff Association and B'nai B'rith.

2. *Life Insurance and Retirement Plan.* B'nai B'rith shall maintain a life insurance and retirement plan for regular employees.

a. Participation by the employee shall be at his individual option but in accord with established provisions for the exercise of this option.

b. Terms and conditions shall be periodically reviewed by B'nai B'rith in consultation with representatives of the Staff Association for the purpose of improving the retirement pension and other benefits of the plan.

ARTICLE XIII—HOLIDAYS

1. The following national and religious holidays shall be granted with pay to regular employees: New Year's Day; Memorial Day; Independence Day; Labor Day; Election Day (maximum of one-half day for those actually voting); Thanksgiving Day; Christmas Day; Rosh Hashona (two days); Yom Kippur; Succoth (first two and last two days); Passover (first two days and last two days); Shevuoth (two days).

a. For regular employees not stationed in Washington, D. C., legal holidays may be observed in accordance with local practice, but religious holidays shall be observed as specified in paragraphs 1 and 2 of this Article.

2. For Rosh Hashona, Yom Kippur and Passover time off will be given at 3:30 p.m. on the afternoon preceding the first day.

a. Suitable provision shall be made for employees who observe religious holidays and the Sabbath in the Orthodox tradition.

ARTICLE XIV—LEAVES

1. *Sick leave* with pay shall be given for absence of a regular employee due to illness, injury or pregnancy; or for medical or dental treatment; or in case of quarantine. Sick leave shall accrue at the rate of one-and-one-half working days per month and is cumulative to a maximum of sixty days. If sick leave beyond the amount accumulated is required, it may be granted by the proper authority designated by B'nai B'rith.

a. When requested, a doctor's certificate shall be furnished by an employee absent on sick leave for more than two consecutive working days.

2. *Maternity leave* without pay for a period not to exceed one year shall be granted to a regular employee with two or more years of service. Such leave shall be requested at least sixty days before the last day of active duty.

3. *Emergency leave* with pay not to exceed one week may be granted to a regular employee for personal emergencies of death or serious illness in the immediate family of the employee.

4. A regular employee called for *jury duty* shall receive the difference between jury pay and his regular pay, except on days when the jury is not in session at which time the employee shall report for work.

5. A regular employee called for *military reserve training* shall receive the difference between military pay and regu-

lar pay (if the former is the lesser) for a period not to exceed two weeks in any calendar year.

6. *Military leave* without pay shall be granted to a regular employee for extended active service with the Armed Forces. He shall be entitled to return to his employment without loss of prior rights or privileges, provided he applies for reinstatement within ninety days of his completion of satisfactory service.

7. A regular employee shall have the right to apply for *leave with pay for academic study and other purposes* when such leave will, in the opinion of B'nai B'rith, be of sufficient benefit to B'nai B'rith.

ARTICLE XV—VACATION

1. Vacation allowance shall be granted a regular employee at the rate of one-and-two-thirds working days per month and shall be computed on a calendar year basis.

2. An employee shall be entitled to vacation accrual after three months service, retroactively, and from then on.

3. Vacation allowance which will accrue to a regular employee during a calendar year may be credited to him at the beginning of the year. If an employee resigns from B'nai B'rith employment and is indebted for vacation taken but unearned, appropriate refund or salary deduction shall be made.

4. Vacation allowances not used may accumulate to a maximum of twenty working days, which shall be additionally available at the beginning of the calendar year; however

a. in the event the regular employee has accumulated over a period of two years or longer, more than twenty working days of vacation allowance at the beginning of a new calendar year, and his employment is terminated during that year, he shall be entitled to the accumulation in excess of twenty working days, but not to exceed forty working days.

5. Unused vacation allowance shall be taken at the time of termination of employment; but no vacation allowance shall be granted in dismissals for dishonesty, or in resignations without the prescribed notice period.

6. Vacations shall normally be taken in summer, but in any event at a time mutually agreeable to the employee and B'nai B'rith.

ARTICLE XVI—TRAVEL ALLOWANCE

1. A regular employee engaged in authorized travel shall be reimbursed

a. for actual cost of rail and air fare (not to exceed air coach when available, or pullman or lower berth sleeper) or such other means of conveyance as may be applicable and appropriate.

b. for actual cost of taxi or limousine service to and from depots and airports.

c. at the rate of ten cents per mile plus tolls and parking, when a privately-owned automobile is utilized for convenience of B'nai B'rith.

d. at actual cost when a publicly-rented automobile is utilized for the convenience of B'nai B'rith.

e. for the equivalent of air coach (or first-class rail fare when air flight would not be applicable) when a privately-owned automobile is utilized for the convenience of the employee.

f. for actual cost of reasonable hotel accommodations.

g. reasonable laundry and valet charges for travel of five consecutive days or longer.

h. a per diem allowance of ten dollars.

1. The per diem allowance is to include 50 cents for necessary local phone calls and 75 cents for necessary local transportation (bus, subway, taxi,

etc.). Necessary expenditures in excess of these allowances and other miscellaneous expenditures of a regular employee in travel status, authorized and necessary and not otherwise covered by the provisions herein, shall be reimbursed at actual cost.

2. When meals are provided in kind by B'nai B'rith, or any of its components, the per diem shall be reduced as follows:

$1.50 for breakfast
$2.00 for luncheon
$4.00 for dinner

3. For purposes of computing fractional time periods, the day shall be deemed to be in four parts:

a. from 6 a.m. to 12 noon;
b. from 12 noon to 6 p.m.;
c. from 6 p.m. to 12 midnight;
d. from 12 midnight to 6 a.m.

and the fractional per diem shall be computed at $2.50 for each part of the day.

4. A regular employee not in a travel status but incurring petty cash expenses necessary to the professional performance of his assignment shall be reimbursed actual cost.

5. A regular employee engaged in foreign travel shall be reimbursed the regular per diem allowance except

a. he shall be reimbursed a special allowance not to exceed actual cost when the circumstances impose traveling costs in excess of the regular per diem.

b. Canada shall be deemed domestic travel.

6. Employees shall use proper prudence and judgment in incurring travel and petty cash expenses.

7. An employee shall have the right to draw advance funds for a specific travel assignment in a sum not to exceed the estimated cost.

ARTICLE XVII—SEVERANCE PAY

1. Severance pay shall be computed at the rate of three weeks salary for each year's service up to a maximum of one year's salary and shall be paid a regular employee whose employment is terminated by

a. separation as defined in Article VI

b. disabling illness of a permanent nature, providing the disabled employee has one or more years of seniority.

c. dismissal for incompetence of a continuing nature or for gross personal misconduct, as defined in Article VII.

2. Severance pay for dismissal on the grounds of malfeasance, misfeasance, or nonfeasance other than incompetence of a continuing nature is not authorized, except that a B'nai B'rith committee composed of the President, Executive Vice President and Chairman of the Personnel Practices Committee may, at its discretion, consider terms of dismissal for malfeasance and misfeasance in individual cases.

3. The computation of severance pay shall include prorated allowances for fractional periods of a year.

4. Severance pay shall be exclusive of unused vacation allowance or notice periods of separation or dismissal; however, unused vacation allowance shall not be considered in computing length of service for severance pay.

ARTICLE XVIII—GRIEVANCE PROCEDURE

1. In the event of a grievance the party or parties involved shall have the right to be represented personally, or by the Staff Association, or by counsel.

2. The procedure for handling a grievance shall be as follows:

a. The aggrieved party (or parties) shall present his complaint to his immediate supervisor. In the event

the matter is not satisfactorily settled within two weeks, then,

b. the aggrieved party (or parties) shall have the right to take up the complaint with the next higher authority, continuing this procedure up to the office of the Executive Vice President of B'nai B'rith. In the event the complaint is still not satisfactorily settled within a period of two weeks.

c. the aggrieved party (or parties) shall have the right to take up the complaint with the President of the Order, or such committee as the President may designate. In the event the complaint is not satisfactorily settled within a period of six weeks,

d. the aggrieved party (or parties) then shall have the right to submit the matter to arbitration as defined in paragraph 3 of this Article.

3. In the event a complaint or dispute is unresolved prior to arbitration the procedure shall be as follows:

a. B'nai B'rith and the Staff Association shall select an impartial arbitrator mutually agreed upon or a three-member arbitration board which shall include one member appointed by B'nai B'rith, one member appointed by the Staff Association and a third member selected by the two who shall serve as chairman.

b. The decision of the arbitrator or the majority decision of the arbitration board shall be binding upon all concerned.

4. A discharged employee who contests his dismissal as a grievance must do so within one week of receipt of written notice of dismissal. Until final adjudication of his grievance he shall be deemed a regular employee.

a. In extraordinary cases B'nai B'rith may suspend the employee, but if decision is ultimately made in the

employee's favor, all compensation, leave and other privileges shall be awarded retroactively to the date of his suspension.

ARTICLE XIX—EXPIRATION AND RENEWAL OF AGREEMENT

1. This revised Agreement shall come into full force and effect as from January 1, 1965, shall remain in force for a period of one year, and shall be renewed automatically each year thereafter, unless either party gives written notice of termination or renegotiation to the other party at least ninety days prior to the expiration date.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 739

B'NAI B'RITH, INC.,

Petitioner

v.

SAUL E. JOFTES

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR SAUL E. JOFTES IN OPPOSITION

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1. After over twenty years of employment by petitioner in various capacities, including but not limited to Director General of its Office of International Affairs, Secretary General of its International Council, and at the time material, its Director of Research, a Department Head (Appendix 26), at an annual salary of twenty thousand dollars, Saul E. Joftes, respondent, was dismissed instanter on January 5, 1968, by petitioner's President on the stated grounds of "gross personal misconduct." Respondent chose not to

contest his dismissal. After several ignored demands, he, by a letter dated January 16, 1968, to petitioner's Comptroller with copies to petitioner's President, Executive Vice President, and the President of a "Headquarters Staff Association", demanded severance pay, his unpaid salary to January 5, 1968, his accumulated vacation pay, a lump sum payment in lieu of the required notice period, and the return of his contributions to the B'nai B'rith retirement fund, with interest (Appendix 28-29). All of these were provided for in the agreement between petitioner and the Headquarters Staff Association, set forth in the Appendix at pages 14 to 22. The Headquarters Staff Association, as is shown by the agreement, is the only one such organization in the world. It is unaffiliated and resides only in the District of Columbia.

The President of B'nai B'rith, Inc., responded to this written demand by a letter dated February 14, 1968, in which he said, among other things,

> "* * * I see no purpose to be served in arguing the issues with you through correspondence. * * * your presence at any time in our headquarters building and your use of the parking area reserved for employees is both unwelcome and unauthorized and you are hereby directed not to enter this building or use the aforesaid parking area. I trust the foregoing will meet with your immediate compliance and will also terminate the need for any further correspondence between you and the undersigned." (Appendix 30-31).

Respondent Joftes thereafter received a check for his unpaid salary, and still later his contributions to the retirement fund were returned to him, with interest. No severance pay, accumulated leave, and/or notice pay, nor a decision as to whether he would get them or what he had to do to get a decision having been received, and his demands having been ignored, respondent Joftes filed this action on October 14, 1968.

The Staff Association Agreement referred to above provides that an employee with over twenty years of service

who is dismissed for "gross personal misconduct" is entitled to receive a sum equal to one year's salary as severance pay (Articles XVII and VII); a lump sum for accumulated vacation pay (Article XV, 4a); and one month's notice of intent to dismiss (Article VII, 2a). The Agreement also contains "Article XVIII–Grievance Procedure" (Appendix 21-22). It provides that if a member of the Staff Association has a "grievance" he "shall have the right" to file it personally. It provides further that if he starts a grievance, he must talk to his immediate supervisor first. Respondent Joftes' immediate supervisor was the Executive Vice President who had tried to fire him in 1967 (Appendix 23-25). The Agreement provides, further, that if a grievant does not get satisfaction from the Executive Vice President within two weeks, he "shall have the right" to appeal to the President of B'nai B'rith, the man who had just fired respondent Joftes and had written him the February 14, 1968 letter. The "Grievance Procedure" also provides that if a grievant does not get satisfaction from the President of the Order within six weeks, he "shall have the right" to submit his demands to arbitration. The Agreement also provides that demands for severance pay could also be taken to "a B'nai B'rith Committee composed of the President, Executive Vice President, and Chairman of the Personnel Practices Committee." (Article XVII).

2. Petitioner, although the argument was not made in the trial Court, argued to the Court of Appeals and argues here that this Court's decision in *Republic Steel Corporation v. Maddox*, 379 U.S. 650 (1965), should have caused a reversal in the Court of Appeals or one here. The Court of Appeals affirmed the trial Court per curiam and without opinion. Respondent Joftes argued there, as he does here, that the facts distinguish the two cases. (1) The members of the "Headquarters Staff Association" are not "employees" as contemplated by the Federal Labor Management Relations Act. (2) The "Association" is not a "labor union" as defined by the Act. (3) Respondent Joftes was a supervisor not covered by the Act. (4) Petitioner was estopped by the

conduct of its President to rely on unexhausted grievance and arbitration procedures as a defense to the Court action. (5) Any attempt to get relief by the grievance procedure route would have been futile and, therefore, unnecessary. (6) The Article XVIII grievance procedure was not the exclusive method for determination of Mr. Joftes' claims and he, therefore, was not limited to it.

International Organization of Masters, M & P v. N.L.R.B., 122 U.S. App. D.C. 74, 351 F.2d 771 (1965), supports points (1) and (2). We question the propriety of petitioner's statement on page 7 of his petition that "the fact is that the majority [of the members of the Headquarters Staff Association] are non-supervisory" because there is no such evidence in the record. This is a patent attempt to dull the impact of the above cited case by supplying "facts" not of record. The issue was not raised in the trial Court. *International Union of United Brewery, F.C.S.D. and D. Workers of America, AFL-CIO v. N.L.R.B.*, 111 U.S. App. D.C. 383, 298 F.2d 297, 302-305 (1961), *cert. den.* 369 U.S. 843 (1962), supports point 3. *Vaca v. Sipes*, 386 U.S. 171, 185 (1967), supports point 4. We question the propriety of petitioner's unsupported statement on page 8 about what happened during argument in the Court of Appeals and we remember nothing during that argument that would support the statement if it were permissible to urge this Court to take action on the basis of matters not of record. *Humphrey v. Moore*, 375 U.S. 335 (1964), supports point 5. *Republic Steel Corporation v. Maddox, supra*, supports point 6.

Since petitioner relies exclusively on the contention that the action of the Court of Appeals is in conflict with this Court's decision in *Maddox*, the petition for a writ of certiorari should be denied because of the many distinguishing features in the instant case.

Respectfully submitted,

Byron N. Scott
Attorney for Respondent

October, 1970.